

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
BellSouth Corporation)	RM No. 11299
)	
Petition for Rulemaking to Change The)	
Distribution Methodology for Shared Local)	
Number Portability and Thousands-Block)	
Number Pooling Costs)	

**COMMENTS OF XO COMMUNICATIONS SERVICES, INC. AND XSPEDIUS
COMMUNICATIONS, LLC IN OPPOSITION TO BELL SOUTH'S PETITION FOR
RULEMAKING TO CHANGE DISTRIBUTION METHODOLOGY FOR LOCAL
NUMBER PORTABILITY AND THOUSANDS-BLOCK NUMBER POOLING**

Heather B. Gold
Senior Vice President, Government Relations
XO Communications Services, Inc.
11111 Sunset Hills Road
Reston, VA 20190
703-547-2861

James C. Falvey
Senior Vice President, Regulatory Affairs
Xspedius Communications, LLC
14405 Laurel Place
Suite 200
Laurel, Maryland 20707-6102
(301) 361-4298

Brad E. Mutschelknaus
Thomas Cohen
Heather T. Hendrickson
KELLEY DRYE & WARREN LLP
1200 19th Street, N.W., Suite 500
Washington, D.C. 20036
(202) 955-9600

*Counsel to XO Communications Services,
Inc. and Xspedius Communications, LLC*

Dated: January 5, 2006

TABLE OF CONTENTS

	Page
I. INTRODUCTION AND SUMMARY	1
II. THE COMMISSION’S REVENUE-BASED COST ALLOCATION MECHANISM FOR LNP AND NUMBER POOLING CONTINUES TO BENEFIT CONSUMERS AND PROMOTES COMPETITION	3
III. BELLSOUTH PROVIDES NO COMPELLING JUSTIFICATION TO INITIATE A RULEMAKING PROCEEDING TO MODIFY COST ALLOCATION MECHANISM FOR LNP AND NUMBER POOLING	7
IV. USAGE-BASED COST ALLOCATION MECHANISM FOR LNP AND NUMBER POOLING WOULD NOT BE COMPETITIVELY NEUTRAL AND WOULD SHARPLY INCREASE CLEC NUMBERING COSTS	11
V. CONCLUSION.....	13

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
BellSouth Corporation)	RM No. 11299
)	
Petition for Rulemaking to Change The)	
Distribution Methodology for Shared Local)	
Number Portability and Thousands-Block)	
Number Pooling Costs)	

**COMMENTS OF XO COMMUNICATIONS SERVICES, INC. AND XSPEDIUS
COMMUNICATIONS, LLC IN OPPOSITION TO BELL SOUTH'S PETITION FOR
RULEMAKING TO CHANGE DISTRIBUTION METHODOLOGY FOR LOCAL
NUMBER PORTABILITY AND THOUSANDS-BLOCK NUMBER POOLING**

XO Communications Services, Inc. ("XO") and Xspedius Communications, LLC ("Xspedius") (collectively, the "Commenters"), through counsel, hereby respectfully submit their Comments in opposition to BellSouth Corporation's ("BellSouth's") Petition for Rulemaking to change the cost allocation methodology for shared Local Number Portability ("LNP") and Thousands-Block Number Pooling (otherwise known as "number pooling") from a revenue-based mechanism to a usage-based mechanism.¹

I. INTRODUCTION AND SUMMARY

BellSouth requests that the Federal Communications Commission ("Commission") initiate a rulemaking to change the current cost allocation mechanism for LNP

¹ *In the Matter of BellSouth Corporation Petition for Rulemaking to Change the Distribution Methodology for Shared Local Number Portability and Thousands Block Number Pooling Costs*, Petition for Rulemaking, RM-11299 (filed Nov. 3, 2005) ("BellSouth Petition"). See also *Pleading Cycle Established for Comments on BellSouth Corporation's Petition for Rulemaking to Change the Distribution Methodology for Shared Local Number Portability and Thousands-Block Number Pooling Costs*, Public Notice, DA 05-3008 (Nov. 21, 2005).

and number pooling.² Specifically, BellSouth seeks to change the current methodology, which allocates the administration costs of LNP and number pooling based on a carrier's revenue, to a methodology based on a carrier's usage. BellSouth's reason for the requested change in cost allocation is clear and simple: it wants to contribute less for LNP and number pooling and have other carriers contribute more.³ Accordingly, BellSouth has set forth an elaborate, yet faulty, web of arguments and data to justify its position that the Commission should overhaul its numbering rules with regard to cost allocation in order to relieve BellSouth, as much as possible, of its shared financial obligation to pay for the administration of LNP and number pooling.

The Commenters respectfully submit that BellSouth's Petition for rulemaking should be denied in its entirety. When it adopted the current cost recovery methodologies for LNP and number pooling, the Commission rejected the very same approach BellSouth is now proposing because it did not meet the legal requirement of competitive neutrality. That still is the case.

The current revenue-based cost allocation system set forth in the Commission's rules for LNP and number pooling⁴ continues to facilitate the use and growth of LNP and number pooling, which benefits consumers and promotes competition. Moreover, the Commission's current costing methodology is competitively neutral, as required by section 251(e)(2) of the Communications Act, as amended (the "Act").⁵ As discussed below, although BellSouth's shared costs may have increased since the Commission issued its cost allocation rules for LNP in 1998, so have the shared costs of other carriers in the industry. Indeed, a real

² BellSouth Petition at 1-2.

³ BellSouth Petition at 28 ("BellSouth (and other providers) that do not generate significant billable transactions, yet have a larger allocation percentage based upon their revenues are significantly handicapped by the escalating shared costs.").

⁴ See 47 C.F.R. § 52.32.

⁵ 47 U.S.C. § 251(e)(2).

value of the current rules is that they ensure that as the shared costs increase, the competitively-neutral requirement continues to be met. Data comparing the competitive impact on BellSouth, XO, and Xspedius support this conclusion. In contrast, the harm to competitors from BellSouth's usage-based proposal is demonstrable and enormous.

The Commission's competitive neutrality test that was the basis of its revenue-based cost allocation rules for LNP in 1998 and number pooling in 2000 is still relevant and requires that carriers pay for LNP and number pooling administrative shared costs based on revenue as opposed to usage. To do otherwise, would have a dramatic and disproportionate impact on a Competitive Local Exchange Carrier's ("CLEC's") costs that substantially outweighs any legitimate benefit to BellSouth. Accordingly, the usage-based mechanism, as proposed by BellSouth, is not competitively neutral, would disadvantage carriers that continue to seek a toehold in the market against the Incumbent Local Exchange Carriers ("ILECs"), and would discourage carriers from engaging in LNP and number pooling activities that benefit all consumers and promote competition in the local marketplace. For these reasons, as discussed in detail below, the Commenters respectfully submit that the Commission should deny BellSouth's Petition.

II. THE COMMISSION'S REVENUE-BASED COST ALLOCATION MECHANISM FOR LNP AND NUMBER POOLING CONTINUES TO BENEFIT CONSUMERS AND PROMOTES COMPETITION

The Commission's justification and rationale for establishing a revenue-based allocation mechanism for sharing the costs of LNP and number pooling among industry members is sound and complies with the competitive neutrality mandate of section 251(e)(2) of

the Act.⁶ Despite BellSouth's repeated claims that the Commission's revenue-based approach is now "an outdated mechanism,"⁷ the Commission's reasoning for a revenue-based cost allocation mechanism remains valid in today's telecommunications marketplace. Moreover, the revenue-based cost allocation method is still appropriate today to allow all consumers to benefit from LNP and number pooling and to promote competition in the local marketplace.

The Commission defined shared costs for numbering administration as "costs **incurred by the industry as a whole.**"⁸ With respect to LNP, the Commission held in its *Third Report and Order*, that:

Distributing the shared costs among telecommunications carriers in proportion to database use would shift these costs to telecommunications carriers that win more customers because such carriers will perform more uploads. At the outset of number portability, these carriers are more likely to be competitive LECs. Consequently, **usage-sensitive distribution of the shared costs could "give one service provider an appreciable, incremental cost advantage over another service provider when competing for a specific subscriber," as well as "disparately affect the ability of competing service providers to earn a normal return."**⁹

In coming to this conclusion, the Commission utilized a competitive neutrality test, in accordance with section 251(e)(2) of the Act, to ensure that the "way carriers bear the costs of number portability: (1) must not give one service provider an appreciable, incremental cost advantage over another service provider when competing for a specific subscriber, and (2) must not disparately affect the ability of competing service providers to earn a normal return."¹⁰

⁶ 47 U.S.C. § 251(e)(2) ("The cost of establishing telecommunications numbering administration arrangements and number portability shall be born by all telecommunications carriers on a competitively neutral basis as determined by the Commission.").

⁷ BellSouth Petition at i.

⁸ *In the Matter of Telephone Number Portability*, Third Report and Order, 13 FCC Rcd 11701, ¶69 (May 12, 1998) ("*Third Report and Order*").

⁹ *Id.* at ¶88.

¹⁰ *Id.* at ¶42.

With regard to number pooling, the Commission used the same competitive neutrality test to require a revenue-based cost allocation methodology for the administration of national number pooling.¹¹ In particular, the Commission held:

We conclude that the allocation of shared industry costs only among the carriers that participate in thousands-block number pooling or through a per-number charge, based on the quantity of numbers held by a carrier, would not comply with the section 251(e)(2) requirement that all telecommunications carriers bear the cost of numbering administration on a competitively neutral basis....We further conclude that **the costs of thousands-block number pooling be allocated to all telecommunications carriers in proportion to each carrier's interstate, intrastate, and international telecommunication end-user revenues.** Allocation of thousands-block number pooling costs according to a carrier's interstate, intrastate, and international telecommunication end-user revenues is consistent with the established precedent for cost recovery for NANP administration using the NANPA formula, as well as our cost recovery mechanism for number portability.¹²

Based on the precedent discussed above, the Commission clearly determined that a revenue-based approach was competitively neutral for both LNP and number pooling so that the financial burden of administration does not unfairly “shift” to those carriers that utilize LNP or number pooling more than others. Further, as demonstrated in Section III of the Comments, the current methodology is operating as planned to benefit consumers and promote competition. The evidence presented in that section shows that BellSouth is not burdened disproportionately. Rather, as competitors grow, they pay a larger share of the costs while competitive neutrality is preserved.

In contrast, BellSouth in its Petition is asking the Commission to do just that, initiate a substantial “financial shift” in the manner in which LNP and number pooling costs are borne. Under BellSouth’s proposal, “the shared industry costs incurred to operate and manage

¹¹ *In the Matter of Numbering Resource Optimization*, Report and Order and Further Notice of Proposed Rulemaking, 15 FCC Rcd 7574, ¶¶ 201-207 (“*Number Pooling Report and Order*”).

¹² *Id.* at ¶ 207.

each regional database would be distributed among service providers **based upon each provider's use of the particular database serving the provider's region.**"¹³

BellSouth is attempting to flip the competitive neutrality mandate of section 251(e)(2) on its head by claiming "the current cost allocation mechanism no longer satisfies the competitive neutrality mandate in Section 251(e)(2) because it inequitably burdens certain carriers by requiring them to pay for costs that they do not cause."¹⁴ BellSouth completely disregards the Commission precedent set forth in the *Third Report and Order* for LNP and the *Number Pooling Report and Order* and asks the Commission to shift the financial cost of numbering administration away from ILECs and to other carriers, *i.e.*, CLECs and other new entrants, such as wireless carriers and Voice-over-Internet-Protocol ("VoIP") providers that have less revenue than ILECs and will likely, in large part because of their position as new entrants, engage in LNP and number pooling more than entrenched incumbent carriers such as BellSouth. Accordingly, BellSouth's usage-based proposal is in complete contravention to the Commission's rationale for the revenue-based cost allocation mechanism for LNP and number pooling and the competitive neutrality mandate set forth in section 251(3)(2) of the Act and, therefore, should not be considered in a rulemaking proceeding.

Furthermore, BellSouth's claim that the FCC's cost allocation rules should be *completely modified to a usage-based mechanism because BellSouth does not receive any "benefit" under the current system completely misconstrues the purpose of LNP and number pooling, which is to benefit all carriers and consumers.*¹⁵ The FCC's rules and orders clearly

¹³ BellSouth Petition at i.

¹⁴ *Id.*

¹⁵ See BellSouth Petition at 30 ("[t]he current system of allocating shared costs based upon telecommunications revenues has adversely affected BellSouth's ability to earn a normal return by driving up its LNP and pooling expenses with no corresponding benefit."); see also *id.* at 31 ("[t]his

demonstrate that LNP and number pooling administration allow optimal choice for consumers and competition for all carriers. In the Commission's *Third Report and Order*, it stated:

The Commission has noted that the absence of number portability "likely would deter entry by competitive providers of local service because of the value customers place on retaining their telephone numbers. Business customers, in particular, may be reluctant to incur the administrative, marketing, and goodwill costs associated with changing telephone numbers." **Although telecommunications carriers, both incumbents and new entrants, must incur costs to implement number portability, the long-term benefits that will follow as number portability gives consumers more competitive options outweighs these costs.**¹⁶

As clearly stated by the Commission, the purpose of LNP and number pooling is to develop numbering options for consumers and promote competition in the local telecommunications market – the same local competition that permitted BellSouth to enter the lucrative long distance market. Again, BellSouth's Petition completely disregards the principle of section 251(e) of the Act and instead focuses solely on its interest, or lack thereof, in current LNP and number pooling policies and attempts to obtain relief from its shared costs obligations.¹⁷ Such efforts must be rejected by the Commission and not entertained in a rulemaking proceeding.

III. BELLSOUTH PROVIDES NO COMPELLING JUSTIFICATION TO INITIATE A RULEMAKING PROCEEDING TO MODIFY COST ALLOCATION MECHANISM FOR LNP AND NUMBER POOLING

BellSouth's Petition fails to present evidence that supports its claim that the Commission should change its cost allocation rules for LNP and number pooling from a revenue-based mechanism to a usage-based mechanism. Although BellSouth claims that that the

approach places a disproportionate burden upon BellSouth by requiring it to absorb costs for which to is neither responsible nor receives any benefit.").

¹⁶ *Third Report and Order* at ¶4. See also *Number Pooling Report and Order* at ¶¶4-6.

¹⁷ See *supra*, n. 13. Moreover, it is disingenuous for BellSouth to claim it receives no benefit from LNP and number pooling as BellSouth clearly benefits from the proper functioning of numbering databases and the proper routing of calls to and from BellSouth customers.

Commission's cost allocation mechanism for LNP and number pooling is "outdated" as the "communications landscape has evolved dramatically since the Commission first adopted its LNP cost distribution and recovery rules in 1998,"¹⁸ BellSouth lacks any persuasive evidence to support its claims.

With respect to wireline CLECs, BellSouth cites the Wireline Competition Bureau's July 2005 Local Competition Report to demonstrate that CLECs have "matured and are now full-fledged competitors."¹⁹ As an initial matter, the data provided from the Local Competition Report show that by December 31, 2004, the CLEC share of end-user switched access lines was 18.5 percent. This is not a staggering market share and in no way reflects that the CLEC market has "matured" as BellSouth claims. Moreover, what BellSouth fails to acknowledge is that the data provided by the Local Competition Report ends on December 31, 2004 and therefore, does not capture any of the impact of the Commission's *Triennial Review Order*²⁰ or *Triennial Review Remand Order*.²¹ In particular, the Local Competition Report states that there were 32.9 million CLEC switched access lines as of December 31, 2004; however, approximately 50% of these lines were provided over the Unbundled Network Element Platform ("UNE-P"), which is no longer available pursuant to the *Triennial Review Remand Order*.²²

¹⁸ BellSouth Petition. at i.

¹⁹ *Id.* at 12, n. 39.

²⁰ *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers* (CC Docket No. 01-338); *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996* (CC Docket No. 96-98); *Deployment of Services Offering Advanced Telecommunications Capability* (CC Docket No. 98-147), Report and Order on Remand and Further Notice of Proposed Rulemaking, FCC 03-36, 18 FCC Rcd 16978 (rel. Aug. 21, 2003), vacated and remanded in part, *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004). ("*Triennial Review Order*").

²¹ *In the Matter of Unbundled Access to Network Elements* (WC Docket No 04-313); *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers* (CC Docket No. 01-338), Order on Remand, FCC 04-290 (rel. Feb. 4, 2005). ("*Triennial Review Remand Order*").

²² See Local Competition Report, Table 4.

Furthermore, the Local Competition Report in fact demonstrates that the growth in the amount of CLEC UNEs has been relatively flat for the last three years as is the case for facilities-based growth.²³ Not only has the local market dynamic changed with the Commission's *Triennial Review Order* and *Triennial Review Remand Order*, the two biggest CLECs, AT&T and MCI, have undergone mergers with SBC and Verizon, respectively. Thus, contrary to BellSouth's repeated claims that the local services market has matured and reached full competition, the actual data reflects a market where CLECs continue to struggle for traction in the local services marketplace. Accordingly, there have been no changes in the local communications marketplace that warrant the Commission abandoning its revenue-based cost allocation mechanism for LNP and number pooling and therefore, BellSouth's Petition should be denied. Indeed, it is more important than ever that the Commission's cost allocation rules for LNP and number pooling not shift additional financial burden to CLECs such that the cost allocation "disparately affect the ability of competing service providers to earn a normal return."²⁴

In addition to misconstruing the competitive presence in the local market as justification for an overhaul of the Commission's cost allocation rules, BellSouth attempts to present significant amounts of data demonstrating that its LNP and number pooling shared costs

²³ *Id.* Indeed, the July 2006 Local Competition Report will likely report lower numbers of CLEC switched access lines. Moreover, as highlighted in Table 3, the growth in facilities-based competition is largely due to cable.

²⁴ Moreover with respect to VoIP, such service providers (and carriers that provide numbering resources to VoIP providers) will likely engage in substantially more LNP ports than ILECs, such as BellSouth. Nevertheless, they are "new entrants" in the communications marketplace, as recognized by BellSouth (BellSouth Petition at ii). Therefore, under the Commission's competitive neutrality test and in accordance with section 251(e)(2) of the Act, the cost allocation rules should not "shift these costs to telecommunications carriers that win more customers because such carriers will perform more uploads." While at the release of the Commission's 1998 *Third Report and Order*, the Commission envisioned CLECs to be the carriers performing the majority of the uploads, the need for competitive neutrality and the need for a revenue-based cost allocation mechanism still remains with respect to VoIP providers and carriers providing numbers resources to such providers.

have increased dramatically. By presenting its own company data, BellSouth hopes to demonstrate that its shared costs have increased even though its use for LNP and number pooling has decreased. But the increase or decrease in BellSouth's use of LNP and number pooling is irrelevant to the Commission's competitive neutrality test, and the Commenters have already refuted BellSouth's faulty claim that its cost allocation should be based on its use or "benefit" above in Section II.

With respect to BellSouth's shared cost data, the Commission must recognize it is selective and does not accurately portray the impact of the current rules and BellSouth's usage-based proposal. First, the data only indicate the absolute amount of payments without providing any context in terms of the financial or competitive impact. Second, the data do not distinguish between cost increases caused by wireless entities and other competitors. Third, and most importantly, BellSouth has only presented data for its own company and has failed to present any competitive data of other carriers that contribute to the shared costs of LNP and number pooling. To provide a more complete and accurate picture, the Commenters provide a comparison chart below that demonstrates that (1) the financial burden of the current rules as measured by the percentage of revenue paid by BellSouth and XO of total revenues is relatively minor, and (2) the competitive impact as measured by a percentage of EBITDA dedicated to the administration of LNP and number pooling is somewhat similar for BellSouth and XO:

Comparison of Revenue and EBITDA Burdens of BellSouth and XO
Under Current Revenue-Based Allocation System (2004)²⁵

	% of Revenues	% of EBITDA
BellSouth	.033%	.074%
XO	.02%	1.5%

This chart confirms that the revenue-based cost allocation mechanism meets the competitive neutrality mandate of section 251(e)(2) as the percentage of revenue and EBITDA are relatively equal for BellSouth and a competitive carrier. Accordingly, the Commission should continue to adhere to the revenue-based cost allocation rules that have served to bring porting options to consumers and competition to the local market and deny BellSouth's Petition.

IV. USAGE-BASED COST ALLOCATION MECHANISM FOR LNP AND NUMBER POOLING WOULD NOT BE COMPETITIVELY NEUTRAL AND WOULD SHARPLY INCREASE CLEC NUMBERING COSTS

As discussed above, the current communications marketplace does not warrant a change in the LNP and number pooling revenue-based cost allocation mechanism. Indeed, the usage-based approach proposed by BellSouth in its Petition would have a dramatic impact on CLECs, such as XO and Xspedius. To illustrate this point, XO has provided the following chart to demonstrate the percentage of revenue and percentage of EBITDA it must dedicate to LNP and number pooling administration under a revenue-based mechanism and a usage-based mechanism:

²⁵ Sources for chart include: (1) BellSouth Data from Petition and UBS; (2) XO LNP/Number Pooling Data from NeuStar; and (3) XO revenues/EBITDA provided by company.

Comparison on XO of Revenue-Based and Usage-Based Allocation Systems:²⁶

	% of Revenues (Revenue Based)	% of Revenues (Usage Based)	% of EBITDA (Revenue Based)	% of EBITDA (Usage Based)
2004	.02%	.6%	1.5%	41%
2005E	.03%	1.3%	.3%	15%

As the Commission can see, moving from a revenue-based mechanism to one based on usage would have a dramatic impact on the percentage of revenue and EBITDA XO would have to devote to LNP and number pooling administration. Whereas BellSouth claims that under a usage-based allocation mechanism, its shared costs would decrease, XO's costs would increase enormously. As a percent of revenues, *XO's costs would increase between 30 and 40 times*, and, as a percent of EBITDA, its costs would increase roughly between 30 and 50 times. Such a dramatic increase would be devastating to XO, and the impact on other CLECs would likewise be very harmful. For example, based on data from NeuStar, *Xspedius' numbering costs would increase more than tenfold* under the BellSouth plan. Moreover, the disparity of such a dramatic increase in XO's shared costs with a decrease in ILEC shared costs could never satisfy the competitive neutrality mandate of section 251(e)(2) of the Act.

Based on the comparative data presented by the Commenters, the Commission must recognize a fatal flaw in BellSouth's argument that negates the need for a rulemaking proceeding: BellSouth claims that the shared costs of LNP and number pooling have increased dramatically in the last several years due in large part to the increase in wireless communications

²⁶ Sources for chart include: XO LNP/Number Pooling Data from NeuStar, and XO revenues/EBITDA provided by company.

and the corresponding number porting to wireless carriers;²⁷ yet it is the competitive wireline industry that BellSouth uses to justify a usage-based cost methodology, and it will be these very carriers that would need to devote up to 40 times more revenue to LNP and number pooling administration under a usage-based approach. Accordingly, the Commission should reject BellSouth's Petition and not institute a rulemaking. Rather, it should continue to adhere to the current revenue-based approach for cost allocation of LNP and number pooling administration that has proven competitively neutral, continues to benefit consumers, and promotes competition in the local marketplace.

V. CONCLUSION

For the foregoing reasons, XO and Xspedius respectfully urge the Commission to deny BellSouth's Petition for Rulemaking.

Respectfully submitted,

By: Heather Hendrickson
Brad E. Mutschelknaus
Thomas Cohen
Heather T. Hendrickson
KELLEY DRYE & WARREN LLP
1200 19th Street, N.W., Suite 500
Washington, D.C. 20036
(202) 955-9600

*Counsel to XO Communications Services, Inc.
and Xspedius Communications, LLC*

Dated: January 5, 2006

²⁷ BellSouth Petition at 11.